Before the
Federal Communications Commission
Washington, D.C. 20554



ET Docket No. 93-1

In the Matter of

Amendment of Parts 2 and 15 to
Prohibit Marketing of Radio Scanners
Capable of Intercepting Cellular
Telephone Conversations

## MEMORANDUM OPINION AND ORDER

**Adopted: July 8, 1994;** **Released: July 19, 1994**

By the Commission:

## INTRODUCTION

1. By this action, the Commission denies a request by Kenwood Communications Corporation (Kenwood) for reconsideration of portions of the rules adopted in the *Report and Order* in this proceeding.[1] Those rules, which were adopted in response to the recently enacted Telephone Disclosure and Dispute Resolution Act (TDDRA), Pub. L. 102-556, generally prohibit the manufacture and importation of radio scanners capable of receiving cellular telephone communications. Kenwood seeks changes in the implementation dates for the rules, an exemption for scanners intended for use by certain parties and a relaxation of the definition of equipment that can be readily altered by the user. We find the rule changes requested by Kenwood to be inconsistent with either the intent or the specific provisions of the TDDRA.

## BACKGROUND

2. As defined in Part 15 of our rules, scanning receivers, or "scanners," are radio receivers that can automatically switch between four or more frequencies within the 30-960 MHz band.[2] Historically, the Commission has regulated scanners only with respect to the radio noise that they inherently generate. As a result, many, but not all, currently-available models of scanners are able to receive communications in the Domestic Public Cellular Radio Telecommunications Service, *i.e.*, the cellular service, which uses frequencies in the 824-849 MHz and 869-894 MHz bands. In addition, several publications have described relatively simple modifications that users can make to enable other models of scanners to receive the cellular frequencies.

3. Section 403 of the TDDRA requires that the Commission adopt rules to prohibit the manufacture or importation of scanning equipment that can be used to intercept cellular telephone communications. This section requires the Commission to amend its Part 15 regulations to deny equipment authorization[3] to scanners capable of:

> - receiving transmissions in the frequencies allocated to the Domestic Public Cellular Radio Telecommunications Service;[4]
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> - readily being altered by the user to receive transmissions in such frequencies; or,
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> - being equipped with decoders that convert digital cellular transmissions to analogue voice audio.

Section 403(a) of the TDDRA also requires that the Commission prohibit the manufacture and importation of scanners that do not meet the new requirements beginning one year after the effective date of the amended rules.[5]

4. On April 19, 1993, the Commission adopted the *Report and Order* in this proceeding, implementing the requirements of the TDDRA. The rules became effective on April 26, 1993, and the manufacture and importation of scanning receivers that do not comply with the new rules will be prohibited as of April 26, 1994. The rules define scanners that can be readily altered by the user as:

> ... those for which the ability to receive transmissions in the cellular telephone bands can be added by clipping the leads of, or installing, a simple component such as a diode, resistor and/or jumper wire; replacing a plug-in semiconductor chip; or programming a semiconductor chip using special access codes or an external device, such as a personal computer.[6]

## DISCUSSION

5. In its Petition for Reconsideration, Kenwood raises three issues. First, it argues that the deadlines for complying with the rules adopted in this proceeding should be extended because its product development cycle can often take several years. Second, it requests that scanners sold to Military Affiliate Radio Service (MARS) and Civil Air Patrol (CAP) licensees be exempt from the regulations adopted in this proceeding because MARS and CAP licensees, by virtue of their licenses, are already directly subject to Commission jurisdiction in the event that they illegally monitor cellular communications. Finally, it argues that the definition of "readily altered by the user" that was adopted in this proceeding should include only scanners that can be modified "quickly" by "non-technical"

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[1] *See* Petition for Reconsideration filed by Kenwood Communications Corporation on May 14, 1993; *see also Report and Order*, ET Docket 93-1, 8 FCC Rcd 2911 (1993).

[2] *See* 47 CFR Section 15.3(v).

[3] In order to control their potential to cause harmful interference to authorized radio service, our Part 15 rules require that scanners receive an "equipment authorization" (certification) from the Commission prior to being marketed. *See* 47 CFR Sections 15.101(a) and 2.1031, *et seq.*

[4] The rules for the Domestic Public Cellular Radio Telecommunications Service are contained in Part 22 of the Commission's rules. *See* 47 CFR Part 22, Subpart K.

[5] *See Telephone Disclosure and Dispute Resolution Act, supra*, Section 403(a).

[6] See 47 CFR Section 15.121.

consumers. There were no comments filed in response to the Kenwood petition. These issues, along with our findings and conclusions, are discussed below.

6. *Implementation dates.* Kenwood contends that the April 26, 1993, cutoff date for equipment authorization and the April 26, 1994, cutoff date for manufacture and importation of scanners that do not comply with the new rules do not provide sufficient time to design and build new products to replace those being prohibited. We recognize that the cutoff dates provide only a limited amount of time for transition of products to the new rules. This short period of time is, however, mandated by the TDDRA and reflects the position of Congress that reception of cellular communications by means of scanning receivers is a serious problem that must be resolved expeditiously. Accordingly, we are denying Kenwood's request for an extension of the cutoff dates for importation and manufacture of scanners that do not comply with the new rules.

7. *Exemption for equipment sold to MARS and CAP licensees.* Consistent with Section 403(c) of the TDDRA, the new rules exempt only scanners sold to cellular telephone service providers and federal, state and local governments from the cellular scanner prohibition.[7] Kenwood requests that we also exempt scanners modified at its factory for use by MARS and CAP licensees.[8]

8. Kenwood states that it manufactures two-way transceivers for licensees in various radio services, including land mobile, marine, and amateur users. Some of these transceivers contain scanning capability and, as such, are subject to the rules adopted in this proceeding. While the transceivers are generally set up to operate only on frequencies available within a particular radio service, Kenwood indicates that some of its transceivers are routinely modified at its factory to operate on additional frequencies, such as those used by MARS and CAP licensees, in order to accommodate the needs of its customers. Kenwood states that these factory modifications can result, incidentally, in the ability to scan cellular telephone frequencies. Kenwood argues that MARS and CAP licensees, by virtue of their license, are already directly subject to Commission jurisdiction in the event that they illegally monitor cellular communications, and that therefore there is no need to restrict its factory modifications.

9. We see no reason why it is not possible to manufacture equipment to operate on MARS and CAP frequencies without resulting in that equipment also having the capability to receive the cellular frequencies. MARS and CAP frequencies are far removed from the cellular frequencies.[9] Consequently, we find that there is no technical justification for exempting scanning equipment from the rules adopted in this proceeding based on its intended use by MARS or CAP licensees. Furthermore, although the TDDRA did exempt certain scanners from its requirements, as discussed above, it did not provide for exemptions such as that requested by Kenwood. We recognize that some manufacturers of existing equipment may find it difficult to block out cellular frequencies. However, while the restrictions we have adopted may make it somewhat more difficult and expensive to manufacture certain MARS and CAP equipment, we do not believe that the costs associated with complying with the TDDRA are so great as to justify creating an exemption for MARS and CAP equipment. Moreover, Kenwood's argument that we can take action against any Commission-issued license if the licensee is found to have violated federal law[10] ignores the intent and specific provisions of Section 403 of the TDDRA. Accordingly, we are denying Kenwood's request to exempt equipment sold to MARS and CAP licensees from the rules adopted in this proceeding.

10. *The definition of "readily altered by the user."* Section 403(a) of the TDDRA requires that the Commission deny equipment authorization to scanners capable of being "readily altered by the user." It does not, however, specify the characteristics of a scanner design that is "readily alterable." The only indication of the definition Congress intended for "readily alterable" is found in the legislative history of the TDDRA, where Congress expressed concern about scanners that can be modified by "cutting a single wire" or following the instructions in a "how-to" manual.[11] Based on this information, we proposed, and ultimately adopted, a definition of "readily altered by the user" that describes scanner designs like those found in "how-to" manuals currently on the market. Our definition of scanners that can be "readily altered by the user" reads as follows:

> Receivers capable of "readily being altered by the user" include, but are not limited to, those for which the ability to receive transmissions in the cellular telephone bands can be added by clipping the leads of, or installing, a simple component such as a diode, resistor and/or jumper wire; replacing a plug-in semiconductor chip; or programming a semiconductor chip using special access codes or an external device, such as a personal computer.[12]

11. Kenwood requests that we modify the definition of "readily altered by the user" to include only devices that can be quickly modified by "non-technical consumers."[13] It argues that our description of readily alterable devices does not provide adequate guidance to manufacturers because it only provides a few anecdotal examples, leaving the manufacturer to guess whether or not other designs would be considered "readily alterable."

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[7] Section 403(c) reads, "Effect on Other Laws. - This section shall not affect section 2512(2) of title 18, United States Code." See Telephone Disclosure and Dispute Resolution Act, *supra*, Section 403(a), and 18 U.S.C. Section 2512(2).

[8] MARS licenses are issued by the United States Department of Defense in accordance with the rules of the National Telecommunications and Information Administration. CAP licenses are issued by the Commission in accordance with the provisions of Part 87 of its rules.

[9] The MARS is used for long distance communication between military bases and often involves transmission of radio signals overseas. Consequently, the frequencies used by the MARS need to be below the UHF band, generally no higher than 150 MHz. In the event that there is a need for UHF MARS service, no allocation near the 902-928 MHz band would be acceptable because the military frequency allocations in that region are for radiolocation only. The highest frequency allocated for use by CAP licensees under the Commission's rules is 148.150 MHz. *See* 47 CFR Section 87.173.

[10] See 47 U.S.C. Section 303(m).

[11] See Congressional Record, statement of Senator Pressler, October 9, 1992, at S17121.

[12] See 47 CFR Section 15.121.

[13] *See* Kenwood petition at 7.

12. We believe that Kenwood's proposed definition would make it too easy to modify scanners. It was clearly Congress' intent to stop the manufacture and importation of cellular-blocked scanners that, once purchased by consumers, can be easily modified to receive cellular frequencies. Most of the examples given in our definition of scanners that can be "readily altered by the user" are modifications that perhaps could not be done by "non-technical consumers." Yet, they are examples of precisely the kind of easy modifications that we believe the TDDRA was intended to prohibit. While we appreciate Kenwood's concern that manufacturers may need more guidance on the definition, we do not believe that restricting "readily altered by the user" to include only quick changes made by "non-technical consumers" is appropriate. Nevertheless, to the extent that Kenwood, or any other manufacturer, has specific questions as to whether or how the rule applies to its particular product or situation, it may request an interpretation from our staff. Such inquiries are encouraged and, consistent with our longstanding policy regarding the Part 15 rules, we will allow our equipment authorization staff to interpret, on an ad hoc basis, how these rules will be applied. Accordingly, we are rejecting Kenwood's request.

**ORDERING CLAUSES**

13. In accordance with the above discussion and pursuant to the authority contained in Sections 4(i), 302 and 303 of the *Communications Act of 1934,* as amended, and the *Telephone Disclosure and Dispute Resolution Act,* IT IS ORDERED that the Petition for Reconsideration filed by Kenwood Communications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary